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In The

Supreme Court of the United States

October Term, 1996

HON. THOMAS R. PHILLIPS, et al.,

Petitioners,

vs.

WASHINGTON LEGAL FOUNDATION, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* CONFERENCE OF CHIEF JUSTICES IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Conference of Chief Justices consists of the highest justice or judge in each of the fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands. The purpose of the Conference of Chief Justices is to provide an opportunity for consultation among the highest judicial officers of the several states, commonwealths, and territories, concerning matters of importance in the operation of state courts and judicial systems. In large part, the ultimate goal of the Conference is to improve the administration of justice.

The case of *Phillips v. Washington Legal Foundation* involves a direct attack on state-based efforts to improve the quality and equality of justice in state courts. All fifty states and the District of Columbia have adopted an IOLTA program, the ultimate purpose of which is to exploit an unused economic resource in order to generate funding for improved delivery of legal services to the poor. While there are minor variations in IOLTA programs from state to state, the essential premise is the same – nominal or short-term client deposits in lawyer trust accounts, which by themselves are incapable of generating interest in excess of the banking costs of account management, can be pooled into fewer accounts

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[1] Statement required by Supreme Court Rule 37.6 – This brief has been exclusively authored by the Attorneys for *Amicus Curiae* indicated on the cover of this brief, neither of whom is an attorney for any of the parties to this litigation; and there was no monetary contribution to the preparation or submission of this brief made by any person or entity other than the *amicus curiae*.

thereby reducing banking costs and earning interest in excess of costs. In short, IOLTA programs produce interest earmarked for the nonprofit IOLTA foundations, interest which could not otherwise have been earned by those client deposits eligible for IOLTA pooling. The interest generated by the states' IOLTA programs is vital to the states' pursuit of equal justice under the law.

IOLTA programs not only make a vital contribution to state judicial interests, these programs for the most part are a creature of state judicial invention. Although five states established their IOLTA programs through legislation, the programs in every other state have been adopted by the various state supreme courts. And, of course, because of the contributions made to the administration of justice even in those few states where IOLTA was a product of legislative rather than judicial creativity, the Conference of Chief Justices' interest in this case is apparent. Indeed, the Conference voted unanimously to authorize the filing of this *amicus curiae* brief at its Annual Business Meeting on July 31, 1997. This *amicus curiae* brief is being filed with the written consent of all parties.

SUMMARY OF ARGUMENT

Clients with lawyer trust accounts eligible for IOLTA pooling have no constitutionally protected property interest in receiving any portion of the interest generated by the pooled account. This Court has established that the hallmark of "property" cognizable under the Fifth and

Fourteenth Amendments is a "legitimate claim of entitlement." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Whether a litigant possesses such a claim is assessed in light of "existing rules and understandings" that stem not from the Constitution itself but from an independent source such as state law. *Id*. The existing rules and understandings that determine legitimate claims of entitlement to IOLTA interest absolutely preclude clients whose lawyer trust account deposits are eligible for aggregation in an IOLTA account from establishing any legitimate claim of entitlement to the interest generated by the pooled account.

The only trust account deposits that are eligible for pooling in an IOLTA account are those which are too nominal or too temporary to have any reasonable expectation of earning interest for the client. TEXAS RULES OF COURT – STATE, *Rules Governing the Operation of the Texas Equal Access to Justice Foundation*, Rule 6 (West 1997) (hereinafter "IOLTA Rules"). The IOLTA rules, which have the force of state law, as well as the terms of the IOLTA deposit contracts between lawyers and banking institutions, clearly establish that the interest belongs to the nonprofit IOLTA foundation. IOLTA Rule 4. These rules and contracts are the "existing rules and understandings" that establish those "legitimate claims of entitlement" essential to constitutionally protected "property" interests; and they could not be clearer. A client, at most, possesses an "abstract desire" to enjoy the interest, which is precisely how this Court describes a constitutionally *in*sufficient interest in property. *Roth*, 408 U.S. at 577. Even prior to the advent of IOLTA programs, the trust account deposits which today are eligible for

IOLTA pooling had no chance of generating interest for the client's enjoyment, at first because a combination of ethical considerations and banking laws effectively prohibited it, and later due to the simple economic reality that banking costs in establishing and administering such nominal or short term accounts would always exceed the accounts' capacity to generate interest. In sum, IOLTA programs have changed nothing about the expectations of those clients whose trust account deposits are today eligible for IOLTA pooling – they had no reasonable expectations of enjoying interest earned on their accounts pre-IOLTA; and they have none post-IOLTA. The "existing rules and understandings" – ethical rules, banking laws, economic reality, IOLTA rules, deposit contracts – have *always* foreclosed reasonable expectations that clients will enjoy interest earned by the nominal or short-term accounts that are now eligible for deposit into a pooled IOLTA account.

The Fifth Circuit's ruling that clients enjoy a "property" right to IOLTA interest was based on a misconstruction of this Court's opinion in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), and a gross misreading of state law. Unlike the present case, the year-long $1.8 million interpleader deposit in *Webb's* was independently capable of generating interest in excess of account management costs; and the interpleader fund in *Webb's* was established *only* for the benefit of *Webb's* creditors, while the pooled IOLTA accounts are established not simply for the safekeeping of a client's principal, but to create interest earmarked for the nonprofit IOLTA foundation. Additionally, the Fifth Circuit carelessly relied on a highly general rule of state law – "interest follows principal" –

without seriously considering far more specific rules having the force of state law (the Texas Supreme Court's IOLTA Rules) that far more likely constitute those "existing rules" on which *Roth*'s "legitimate claims of entitlement" are based, and which expressly vest those claims of entitlement in the nonprofit IOLTA foundation.

Unable to establish a property right to IOLTA *interest*, respondents alternatively claim a property right to deny others the benefits of their deposited *principal*. Although clients certainly have a constitutionally protected "property" interest in the principal, that no more includes the right to deny others the benefits of the IOLTA interest than it includes the right to enjoy the interest themselves. Because this Court identifies the whole range of constitutionally protected property interests by reference to *Roth's* "existing rules and understandings that stem from an independent source such as state law," it is apparent that the IOLTA rules and the IOLTA deposit contracts between lawyer and bank foreclose any reasonable client expectation of a right to deny others the IOLTA interest, just as they foreclose any reasonable client expectation to enjoy the benefits of IOLTA interest personally. Therefore, a client's "right" to deny others the benefits of his principal, like his "right" to enjoy the interest, is more "abstract desire" than "legitimate claim of entitlement."

Even though a "right to exclude" is sometimes within the range of protectable interests in property, such a right normally presupposes an interference with property of the type associated with a traditional trespass, a degree of interference simply absent from the present case. This Court has ruled, for example, that a landowner's right to exclude military flights from the airspace above his land

depends on his ability to establish a substantial interference with his use and enjoyment of the property. *United States v. Causby*, 328 U.S. 256, 266 (1946). Moreover, even if a client has a "right to deny" others the benefits of the few dollars and cents of interest attributable to his portion of the pooled IOLTA account, there is no state coercion that denies him the exercise of that "right." In many cases, if not most of them, the creation of a lawyer trust account is a voluntary decision made mutually by lawyer and client in order to facilitate the efficient delivery of legal services to the client. The state has neither coerced clients into depositing funds into such an account nor mandated that they set up an account so nominal in amount or so short-term that it cannot generate interest on its own. Finally, even if a client could establish a "right to deny" which has somehow been "taken" from him, that does not make it a compensable taking. The law is replete with examples of much more substantial restrictions on an owner's right to deny others uses of his property than are implicated by IOLTA programs – *e.g.*, prohibitions on any denial of uses of commercial property based on race, religion, ethnicity, gender, etc. This Court long ago said: "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). In sum, respondents "right to deny" argument establishes, at most, a government-authorized "use" of their principal, but it is a "use" that hardly constitutes a compensable taking.

This case is ultimately about whether the Takings Clause can be distorted to authorize substantial intrusions into areas that fundamentally are matters of state concern. There are few arenas in which the states have stronger interests than in the administration of their own judicial systems. Moreover, in many cases, the states have a constitutional obligation to provide the poor equal access to the state judicial system – an obligation which states are pursuing in part through IOLTA programs. In light of such significant state interests and obligations, this Court should require a much stronger demonstration of a taking of "property" than can be shown in this case before reading the Takings Clause to wreak havoc with all fifty states' creative efforts to improve the administration of justice in state courts.

ARGUMENT

I. A Client with Lawyer Trust Account Deposits Eligible for Pooling in an IOLTA Account has No "Property" Right, Under the Fifth and Fourteenth Amendments, to the Interest Generated by the Pooled Account.

This Court's seminal description of constitutionally protected "property" interests is contained in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). According to *Roth*, "property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those

benefits." *Id.* at 577. This Court further described "legitimate claims of entitlement" as "those claims upon which people rely in their daily lives." *Id.* Just as importantly, the Court provided a curt description of when litigants' claims of beneficial property interests do *not* constitute legitimate claims of entitlement: "[A] person clearly must have more than an abstract need or desire for [the claimed benefit]. He must have more than a unilateral expectation of it." *Id.* With these descriptions and limitations, the Court sought to set boundaries on "property," not only to give the constitutional term "some meaning," *id.* at 572, but to avoid trivializing what the Court expressly described as a "majestic" term and a "great constitutional concept." *Id.* at 571. Indeed, it is difficult to conceive of a less majestic notion of "property" than respondent's fantasy that he owns that which his paltry or short-term "investment" could not independently earn and which could not be earned in the absence of IOLTA's creative pooling of otherwise nonproductive lawyer trust accounts.

Although *Roth* is a procedural due process case, its concept of "property" also controls Takings Clause cases. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992). The *Lucas* opinion emphasized that the Court traditionally resorts to "existing rules or understandings that stem from an independent source such as state law" in identifying and defining the range of interests that qualify for protection as "property" under the Fifth or Fourteenth Amendments. *Id., citing Roth*, 408 U.S. at 577. Justice Kennedy's concurring opinion in *Lucas* further explained that property interests in the Takings Clause

arena must be assessed in light of "reasonable investment-backed expectations." 505 U.S. at 1034 (Kennedy, J., concurring), *citing Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). According to Justice Kennedy, "[t]he expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved." 505 U.S. at 1035 (Kennedy, J., concurring). Such mutually understood expectations based on objective rules and customs are in direct contrast to the mere "unilateral expectation" or "abstract desire" held up in *Roth* as woefully insufficient to generate a legitimate claim of entitlement. Thus, both the majority and concurring opinions in *Lucas* conceive of "property" in a manner completely consistent with *Roth*.

Viewed in light of *Roth* and *Lucas*, it is apparent that a client's claim in whatever amount to interest earned by a pooled IOLTA account is more illusory than real, more "abstract desire" than "legitimate claim of entitlement." Indeed, respondents cannot in good conscience claim that clients whose deposits are independently incapable of earning interest (and therefore eligible for IOLTA pooling) have ever harbored *even a unilateral expectation* of enjoying the interest earned by a pooled IOLTA account. Of course a mere "unilateral expectation" of receiving some benefit is the epitome of *non*property under *Roth*. That clients similarly situated to respondent Summers have never enjoyed even a constitutionally *in*sufficient "unilateral expectation" of receiving interest from lawyer trust accounts, in either the pre-IOLTA or post-IOLTA

world, shows just how far short of the requisite "legitimate claim of entitlement" respondent's claim falls. Pre-IOLTA, there was absolutely no hope for the client to earn interest on client funds held by the lawyer in trust, regardless of the size of the principal, at least until 1980 changes in banking law.[2] Even after the 1980 changes in banking law permitted interest-bearing demand accounts (NOW accounts), such accounts offered no hope of benefits for those clients, such as respondent Summers, whose deposits were nominal or short-term in nature.[3] The post-IOLTA world is no friendlier to client expectations of

[2] Ethical rules require lawyer trust account monies to be available on a client's demand and, before 1980, banking laws did not permit interest-bearing demand accounts. Therefore, prior to 1980, the only banking option available to attorneys for holding a client's funds in trust was a non-interest-bearing demand deposit account.

[3] The bank's service charges would exceed the interest earned in a separate account, and a lawyer's administrative and accounting expenses in managing a pooled account would exceed any interest generated by such an account. Moreover, what lawyer would offer such services to legal clients? Ethical rules prohibit a lawyer's profiting from the client's trust funds, and lawyers presumably prefer to be lawyers rather than bankers/accountants. Indeed, the efforts needed to manage such an account would quite clearly defeat the convenience of having lawyer trust accounts in the first place. Just as importantly, banking regulations permit NOW accounts only if the entire beneficial interest in the funds deposited are held by one or more individuals or by a nonprofit organization. 12 U.S.C. § 1832(a)(2). Thus, if even one of the lawyer's clients is a for profit partnership or corporation, interest could not be earned on a pooled account absent IOLTA's nonprofit umbrella, even if the lawyer wanted to spend valuable time managing such an account in an effort to generate insignificant amounts of interest for clients.

receiving interest on lawyer trust account deposits that are either too nominal or too temporary to generate any financial benefit for the client. Although IOLTA programs permit (and in some states, like Texas, require) lawyers to pool such accounts in order to create a single account with interest-bearing capability, the terms of the lawyer's deposit contract with the bank clearly establish that the interest generated will belong to the nonprofit IOLTA foundation. *See, e.g.*, TEXAS RULES OF COURT – STATE, *Rules Governing the Operation of the Texas Equal Access to Justice Foundation*, Rule 4 (West 1997) (hereinafter "IOLTA Rules"). Thus, in regard to clients' expectations of earning interest on deposits of nominal or short-term funds in a lawyer trust account, IOLTA has changed nothing. Clients had no expectation of enjoying interest before IOLTA and no expectation after. In sum, no client (and certainly no lawyer) has ever had any legitimate expectation of receiving interest from the types of lawyer trust account deposits that are subject to IOLTA pooling. Therefore, any "expectation" claimed by respondents in the present case is surely the "unilateral expectation" that this Court in *Roth* found to exemplify *non*property, rather than the "legitimate claim of entitlement" that constitutes a protected property interest.

In light of the types of client deposits eligible for IOLTA pooling, and the customary pre-IOLTA treatment of such deposits in accordance with both banking laws and a lawyer's ethical obligations, it is evident that a client's claim to the interest generated by a pooled IOLTA account fits none of the various descriptions of "property" propounded in *Lucas* and *Roth*. As already argued,

such a claim is much more akin to an unprotected "unilateral expectation" (if even that) than a "legitimate claim of entitlement" characteristic of protected property. Neither is respondent's claim to IOLTA interest one of those "claims upon which people rely in their daily lives," *Roth* at 577, nor a "reasonable investment-based expectation," *Lucas* at 1034 (Kennedy, J., concurring), nor consistent with "existing rules or understandings," *Roth* at 577, *Lucas* at 1030, nor "based on objective rules and customs that can be understood as reasonable by all parties involved." *Lucas* at 1035 (Kennedy, J., concurring). Indeed, due to banking laws, economic realities, a lawyer's ethical obligations, state law IOLTA rules, and IOLTA account deposit contracts, it is silly even to think of the nominal or short-term client deposits subject to IOLTA pooling as "investments." (One might as well "invest" by putting money in a shoe box under the bed.) Consequently, it is compounded silliness to urge that clients have a "reasonable investment-based expectation" of receiving the portion of IOLTA interest attributable to their deposit when their deposit is incapable of earning them interest on its own, and when the cost of attribution would quite clearly defeat the purpose of pooling in the first place. Moreover, in the present case, the "existing rules or understandings" and "the objective rules and customs" that influence expectations and determine whether such expectations are merely unilateral or instead are mutually understood by all parties involved so as to create a legitimate claim of entitlement can only be the aforementioned banking laws, economic realities, ethical obligations, state law IOLTA rules, and IOLTA deposit contracts. These customs/rules/understandings

literally shout to both lawyer and client: "There is no hope of earning interest for the client on the nominal or short-term deposits eligible for IOLTA pooling." Therefore, this case surely poses a claim to property that is no more than the "abstract desire" that exemplifies *non*-property under this Court's Fifth and Fourteenth Amendment precedent.

The respondents' claim of client entitlement to IOLTA interest is analogous to the untenured university professor's claim on future employment in *Roth*, a claim which this Court refused to recognize as "property." 408 U.S. at 578. Under Wisconsin law, an untenured university professor enjoyed only year-to-year employment. *Id.* at 566. This Court ruled that any "property" interest enjoyed by the professor was created and defined by the terms of his appointment. *Id.* at 578. Because those terms covered his interest in employment for just one year, "[t]hey supported absolutely no possible claim of entitlement to re-employment." *Id.* Consequently, although the professor may have had an abstract concern in being rehired, he did not have a "property" interest. *Id.* Similarly, in this case, the controlling terms of the client's deposit of lawyer trust fund monies – the IOLTA rules and the deposit contract – constituted no promise that the client would receive a portion of IOLTA interest proportional to his principal. Instead, the controlling terms – *i.e.*, those existing rules and understandings that distinguish unilateral expectations from legitimate claims of entitlement – clearly spelled out that the interest from the pooled account would accrue only to the benefit of the IOLTA foundation. Although the client's expectation to benefit from his *principal* in some way was a legitimate

claim of entitlement (like Professor Roth's expectation of employment for one year), any expectation to benefit from the *interest* (like Professor Roth's expectation of future employment) was merely "unilateral." Indeed, Professor Roth had a much stronger expectation than the client here. At least the applicable rules in *Roth* created a *possibility* that the University, in its discretion, would extend the professor's employment. But a client whose lawyer trust account deposit is too meager or too transient to earn interest on its own does not have even the *potential* of enjoying IOLTA interest under existing rules and understandings; nor have such deposits ever harbored such a potential under the rules or understandings of any era.

A quick examination of the types of interests which this Court has recognized as constitutionally protected "property" sheds further light on respondents' position. Indeed, the client's asserted "property" right to enjoy the benefits of IOLTA interest pales in comparison to the following well-recognized property interests:

- land (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992));
- leaseholds (*Almota Farmers Elevator and Warehouse Co. v. United States*, 409 U.S. 470 (1973));
- easements (*United States v. Virginia Electric and Power Co.*, 365 U.S. 624 (1961));
- mineral rights (*Texaco, Inc. v. Short*, 454 U.S. 516 (1982) (holding, however, that such mineral rights lapsed under state law due to 20 consecutive years of nonuse));
- airspace (*United States v. Causby*, 328 U.S. 256, 264 (1946) (finding property interest in "at least as much of the space above the ground as he can occupy or use in connection with the land"));

- water rights (*International Paper Co. v. United States*, 282 U.S. 399 (1931));
- franchises (*Willcox v. Consolidated Gas Co.*, 212 U.S. 19 (1909));
- security interests (*Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935));
- materialmen's liens (*Armstrong v. United States*, 364 U.S. 40 (1960));
- trade secrets (*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984));
- patent rights (*Hollister v. Benedict and Burnham Manufacturing Co.*, 113 U.S. 59 (1885));
- tenured employment (*Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972));
- valid contracts (*Lynch v. United States*, 292 U.S. 571 (1934));
- a driver's license (*Bell v. Burson*, 402 U.S. 535 (1971));
- an occupational license (*In re Ruffalo*, 390 U.S. 544 (1968)).

What each of these "property" rights has in common is an assurance, based on existing rules and understandings, that the "thing" at least bears the potential of being exploited in some way to the holder's advantage. The IOLTA interest in this case, at least in regard to any client expectation of enjoyment, stands in sharp contrast. Existing rules having the force of state law expressly foreclose

even the possibility that a client might enjoy the IOLTA interest; and even absent IOLTA's creative pooling mechanism there would be no potential for the enjoyment of interest from such a nominal or short-term account due to economic reality. In terms of "reasonable investment-backed expectations," client has *nothing*; the IOLTA program has, consequently, taken *nothing*. Therefore, a client's claim to IOLTA interest simply does not belong in the pantheon of this Court's heretofore recognized constitutional interests in property.

The Fifth Circuit mistakenly relied on this Court's decision in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), in identifying a client's property right to the interest generated by a pooled IOLTA account. In that case Eckerd's agreed to purchase Webb's Fabulous Pharmacies for $1.8 million but, at closing, Webb's debts appeared to be greater than the purchase price. In order to protect itself, Eckerd's filed a complaint of interpleader and tendered the purchase price to the court. Almost a year later, the court appointed a receiver for Webb's and a dispute arose when the clerk refused to turn over the interest that was earned on the interpleaded fund while it was held by the clerk, interest which eventually amounted to over $100,000. This Court held that the county's refusal to turn over the interest on the interpleaded fund was an unconstitutional taking. *Id.* at 164-165. Although the interest followed the interpleaded principal in *Webb's*, giving the receiver a "property" interest in both principal and interest, the *Webb's* case is distinguishable from the present dispute over ownership of IOLTA interest in several fundamental ways.

First and foremost, unlike the deposits subject to IOLTA pooling, the year-long $1.8 million deposit in *Webb's* was independently capable of generating interest for the benefit of the principal's owner. The *Webb's* deposit was neither nominal nor short-term. Additionally, because the clerk in *Webb's* had already deducted an administrative fee, it was plainly apparent that the year-long $1.8 million deposit was independently capable of earning interest in excess of administrative costs. 449 U.S. at 162. In other words, the deposit in *Webb's* was quite capable of generating interest income without a creative IOLTA-style pooling of multiple deposits. Therefore, unlike the IOLTA interest, the interest in *Webb's* could have been earned separate and apart from the interpleader fund. Consequently, also unlike the present case, there was no possible way that the clerk in *Webb's* could take credit for creating the opportunity for generating interest. In short, the state in *Webb's* caused an obvious economic injury to the owner of the interpleader fund's principal, while the states' IOLTA programs create an economic opportunity where none had theretofore existed. Indeed, this Court explained in *Webb's* that the clerk's retention of the interest placed an economic burden on interpleaders with no offered police power justification, *id.* at 163, and emphasized that the Takings Clause stands as a shield against such arbitrary uses of governmental power. *Id.* at 164. The present case stands in sharp contrast – the IOLTA programs are operated so as to place no economic burden on trust account depositors, and the justice afforded by IOLTA programs to those who could not otherwise afford it surely undercuts any charges of governmental arbitrariness.

A second fundamental distinction between *Webb's* and the present case is that the interpleader fund in *Webb's* was specifically held only for the ultimate benefit of Webb's creditors. *Id.* at 161. Indeed, that was the whole point of filing the interpleader action and depositing the purchase price for Webb's assets into the fund. Therefore, according to the Court, Webb's creditors had more than just a unilateral expectation. *Id.* In marked contrast, the monies deposited into pooled IOLTA accounts in accordance with a state's IOLTA rules are pooled for one reason only – to generate interest for the IOLTA foundation and its public interest programs. IOLTA pooling expressly is *not* done to create some *de minimis* pro rata benefit for the various owners of the principal.

The Fifth Circuit's misapplication of *Webb's* is far from the only flaw in its opinion. The characterization of IOLTA programs as a "modern-day attempt at alchemy," 94 F.3d at 1000, reveals the depth of its misunderstanding of how IOLTA produces interest. IOLTA programs certainly do not create something out of nothing. Rather, IOLTA's pooling of small or short-term accounts into a larger, more stable single account increases the efficiency by which banks can manage deposited funds. This increased efficiency reduces the costs of banking, correspondingly reducing banks' need to offset costs against interest earned, thereby creating a profit that would not otherwise exist. There is nothing "magic" about IOLTA – it is good old-fashioned efficiency. Perhaps governmental programs that increase efficiency are so rare that the Fifth Circuit could not believe its eyes. Nevertheless, however rare, when government does come up with creative ways both to increase efficiency and to benefit the public, such

efforts are worthy of more than the skepticism shown by the Fifth Circuit. In any event, what IOLTA pooling ultimately accomplished was to transfer the expected enjoyment of the interest generated by lawyer trust accounts from banks to the IOLTA foundation, at no harm to banks due to their reduced costs of administration.

If there has been any alchemy attempted in this case it was surely practiced by the Fifth Circuit when it found that clients have a protectable property interest despite the complete absence of any reasonable expectation – based on rules, customs, or mutually held understandings – of enjoying IOLTA interest. According to the Fifth Circuit, a property right to IOLTA interest attaches the moment the interest accrues, before banks deduct charges. 94 F.3d at 1003. That observation begs the question; the issue is not *whether* the interest is property but, rather, *who* has a legitimate claim of entitlement thereto. Of course, the deposit contracts and the state IOLTA rules declare that the interest is accruing for the benefit of the IOLTA program, therefore rendering any client expectation regarding enjoyment of the interest unreasonable and merely "unilateral." *See* IOLTA Rule 4. But even if the Fifth Circuit's point is that interest would accrue on a nominal or short-term account even without IOLTA pooling, thereby giving the client some temporary property (albeit property that the bank will retain to offset its costs and never distribute to the client), the point still misses the mark. Such an expansive view of constitutionally protected property not only trivializes the Fifth Amendment in direct contravention of *Roth's* characterization of "property" as a "majestic" term, but causes a fundamental constitutional issue to turn on something as mundane

and varied as a given bank's internal accounting practices. Surely, the "legitimate claim of entitlement" that constitutes property means something more than an expectation that a bank clerk might make an entry on some ledger.

Perhaps the most disturbing aspect of the Fifth Circuit opinion, at least from a states' rights standpoint, is its cavalier reliance on a general rule of state law – interest follows principal – without even bothering to consider whether the state may have carved out a specific exception. *See* 94 F.3d at 1000. Such a superficial approach to interpreting state law permits federal courts to manipulate highly generalized legal principles into absolute rules from which the states have no effective power to carve out specific exceptions. Had the Fifth Circuit taken a closer look at Texas state law in this case, it surely would have recognized specific rules and understandings having the force of state law – the Texas Supreme Court's IOLTA Rules and the IOLTA deposit contracts – that clearly control the question of who is entitled to the IOLTA interest. Such situation-specific rules and mutual agreements clearly trump the overly general "interest follows principal" approach in determining who has a legitimate claim of entitlement to the IOLTA interest based upon *Roth*'s "existing rules or understandings."

II. A Client Whose Lawyer Trust Account Deposits are Eligible for IOLTA Pooling Suffers No Taking of any Cognizable Property Right to Deny Others a Beneficial Use of Client Property.

To the extent respondents' "right to exclude" argument rests on an underlying assumption that the IOLTA *interest* is the property of the depositor/client, that assumption has already been shown to fall far short of a "legitimate claim of entitlement." On the other hand, even if the argument is premised upon an asserted right to exclude others from the benefits of a client's deposited *principal*, respondents' fanciful proposition is meritless for several reasons. First, any such "right", like any other asserted property right, qualifies for protection only by reference to *Roth's* "existing rules or understandings." *Lucas*, 505 U.S. at 1030 (the *Roth* characterization is used "to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments"). In *Lucas*, the majority recognized that "it is surely unexceptional" that the Takings Clause does not require compensation when an owner's intended uses for property are frustrated by those "existing rules or understandings." *Id.* Just like the client's expectation of personally enjoying IOLTA interest, his expectation of denying others the benefits of his deposited principal is merely "unilateral" because it is inconsistent with the plain implications of the IOLTA rules and the terms of the IOLTA deposit contracts between lawyer and bank.

Another fundamental problem with respondents' "right to deny benefits" argument is that client-depositors can no more take credit for IOLTA-produced benefits

than they can establish IOLTA-produced economic burdens. Because their individual deposits are unable by themselves to generate income, it is as intellectually dishonest for those depositors to take credit for producing IOLTA interest as it is for them to complain of economic injury on the ground that something of value was "taken" from them. In short, under any commonly understood notion of causation, the benefits produced by IOLTA pooling are attributable to the government's creativity rather than the economic power of any given client's deposited principal. This governmental creativity, embodied in the IOLTA programs of every state, is clearly both the but-for and sole proximate cause of the profound benefit to the states' pursuit of equal justice under the law.[4]

Even when "existing rules and understandings" support a right to exclude others from property, such a right

[4] A helpful analogy to patent law suggests itself here. Although a patent grants an inventor the right to exclude others from making, using, selling, or otherwise benefitting from the invention (unless they pay for those benefits), the patent also defines what is still open to other inventors. *Markman v. Westview Instruments, Inc.*, 116 S.Ct. 1384, 1387 (1996). A subsequent inventor may still receive the benefits of his invention to the extent that it does not infringe on the patent holder. The only "shortcoming" of this analogy is that, unlike the patent holder, the client did nothing creative by making a nominal or short-term deposit into a lawyer trust account. The state, however, did do something creative – it "invented" the IOLTA program. Thus, since the benefits of the program are far more attributable to the inventiveness of IOLTA than to the meager deposits of clients, it follows that those clients have little claim to deny to anyone else the benefits of the state's invention.

normally presupposes an interference somewhat equivalent to a traditional trespass. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374 (1994) (ruling that a city's effort to coerce a landowner into granting pedestrians an easement across her lot was a compensable taking); *United States v. Causby*, 328 U.S. 256, 266 (1946) ("Flights over private land are not a taking unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."). But where is the interference with a client's principal? To recognize a right to deny others any benefits derived from one's property, at least in the absence of some substantial trespass, would lead to absurdities. For example, a whole neighborhood might benefit economically from governmental regulations designed to preserve aesthetics and, consequently, high property values. Could a sloppy homeowner use the Takings Clause to frustrate government efforts to coerce uses of his property that increase the property values of others? If a city earned revenue by conducting public tours of a unique historical area, or produced economic benefits for local hotels and restaurants because of the tourists drawn to the city by such historical tours, could the owner of an architecturally significant building in that historic area raise the Takings Clause in an effort to deny others from enjoying benefits due in some small part to governmental exploitation of his property? Absent a requirement of some substantial interference with property, of the type associated with a traditional trespass, respondent's argument has no stopping point. And if respondents' proposition makes no sense in the context of government uses of *real* property, it makes even less sense in the context of governmental

uses of *personal* property, which the state has much greater power to regulate in the legitimate exercise of its police powers for the common good. *See Lucas*, 505 U.S. at 1027-28. And, if possible, it makes still less sense in the context of *intangible* personal property, such as a client's alleged property "right" to deny others the benefits of the client's principal.

Additionally, the Takings Clause is simply not offended by every state regulation that fosters a beneficial "use" of property which the owner finds undesirable, any more than it is by every regulation that imposes on the owner some detrimental harm. *See, e.g., Lucas*, 505 U.S. at 1017-18 ("our usual assumption [is] that the [state] is simply adjusting the benefits and burdens of economic life in a manner that secures an average reciprocity of advantage to everyone concerned") (citations omitted), at 1027 ("the property owner necessarily expects the use of his property to be restricted, from time to time, by various measures newly enacted by the state in legitimate exercise of its police powers"), and at 1027-28 ("And in the case of personal property, by reason of the state's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might render his property economically useless"); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."). Furthermore, this Court has specifically recognized that a property owner can be coerced to tolerate uses by others of his property that are much more direct, much more substantial, and much less voluntary

than the "use" complained of here. *See, e.g., Pruneyard v. Robbins*, 447 U.S. 74 (1980) (holding that it was not a compensable taking for state law to require that owners of private shopping centers tolerate nondisruptive protest activities on their property). Indeed, any "right" to deny others a beneficial use of property is one that often has been restricted for the common good – *i.e.*, for the benefit of others – even to the chagrin of the property owner. Thus, this Court has never found a compensable taking in laws that deny owners of businesses, restaurants, hotels, and other commercial establishments, the right to exclude others from their property based on race, ethnicity, religion, gender, handicap, etc., even in those cases where the property owner might subjectively suffer some indignity at being required to tolerate the particular use. In short, although respondents arguably point to a governmental "use" of a depositor-client's principal, it is a use that hardly constitutes a compensable taking.

A final flaw fatal to respondents' "right to deny beneficial use" argument is that respondent Summers has nowhere asserted how the IOLTA program has specifically denied him that "right." The creation of a lawyer trust account, in most cases, is a voluntary decision made mutually by lawyer and client. State coercion simply does not enter the picture. Indeed, it is often desirable for both lawyer and client to provide a means for the convenient transfer of funds from client to lawyer for those periodic costs incurred by the lawyer while representing client's legal interests. In short, no law mandates that clients maintain an account that is independently incapable of bearing interest, or even that clients maintain a lawyer trust account at all. Moreover, for those clients who have

decided voluntarily to deposit funds into such an account, ethical considerations require that the principal be available to the client on demand. For these reasons it is surely possible, for clients who so desire, to exercise whatever "right" may exist to deny the state's poor the benefits of the "few dollars and some-odd cents" attributable to an IOLTA program's "use" of their principal.

At bottom, this alternative argument of respondents ("I have the right to *deny others* the benefits of my principal") is little more than a recharacterization of its primary argument ("I have the right to *enjoy* the benefits of my principal") with all its attendant flaws. One unique accomplishment of the recast alternative argument, however, is to reveal the true motive underlying this suit – the frustration of states' grass-roots efforts to ensure all state citizens equal access to the state's judicial system, perhaps because the legal agendas of the poor typically differ from those of respondents. That respondents would "kill the IOLTA goose that lays the golden egg" shows just how little they care about any given client's ability to benefit from IOLTA interest. Indeed, respondents' "if I can't have it, nobody can" argument recalls perhaps the oldest recorded adjudication of ownership in the books – King Solomon's Old Testament decision regarding which of two claimants had the superior claim to a baby. I Kings 3:16-28. After one party agreed to Solomon's suggestion to "split the baby," the King wisely decided that the other party possessed the superior claim. In the same way, respondents here would rather "split the IOLTA baby" than permit the states – *i.e.*, the true "parents," whose creativity gave birth to IOLTA programs with their attendant benefits – to enjoy their offspring. More telling

evidence of the inferiority of respondents' property claims cannot be found.

III. The Expansive View of Property Recognized by the Fifth Circuit, and Urged by Respondents, Substantially Intrudes on States' Ability to Administer Business Which Is Uniquely That of the State.

A decision that IOLTA interest is the property of the client-depositor will have widespread negative ramifications for states' efforts to conduct efficiently that which is uniquely state business. IOLTA programs, of course, are just such an effort – an effort to ensure the equality of justice in state courts. This Court has often recognized the magnitude of a state's interest in the administration of its own justice system. *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991). Indeed, in many situations, this Court has issued the states a constitutional *mandate* to ensure equal justice for the poor. *M.L.B. v. S.L.J.*, 117 S.Ct. 555, 559-64 (1996). In light of these significant state interests and obligations, this Court should require a much stronger showing of a property interest than exists in this case before reading the Constitution to wreak havoc with all fifty states' creative efforts to improve the administration of justice in state courts.[5]

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[5] Affirmance of the Fifth Circuit's holding will not only negatively impact states' efforts to improve the delivery of justice to the poor, it could also have an impact on states' efforts to economically operate state prisons. Many states provide for prisoners to keep nominal amounts of money in trust accounts in order to purchase things from the prison commissary, but

This Court has been especially sensitive to state interests in its Takings Clause jurisprudence. *See, e.g., Lucas*, 505 U.S. at 1017-18 ("our usual assumption [is] that the [state] is simply adjusting the benefits and burdens of economic life in a manner that secures an average reciprocity of advantage to everyone concerned.") (citations omitted), at 1027 ("the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police power."), and at 1027-28 ("And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might render his property economically useless"). Indeed, a fundamental precept of this Court's Fifth and Fourteenth Amendment jurisprudence is that constitutionally protected interests in "property" are defined in large part by reference to state law. *See, e.g., Roth*, at 577; *Lucas*, at 1030. Implicit in this precept is that the creation of property rights is a matter of substantial state concern. This is especially significant in the present case because, through IOLTA programs such as the one at issue, states clearly intended to create property rights and, just as clearly, intended to vest those rights in a particular nonprofit foundation. In other

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prison security concerns foreclose prisoners having access to large amounts of money. Consequently, the individual prisoner accounts are usually too small in amount to earn interest. When the individual prisoner accounts are pooled, however, there is interest generated that states often funnel back into the prison system. States' continued ability to enjoy this source of prison funding also hinges on the outcome in this case.

words, at the very point in time when states' IOLTA creativity produced an expectation of someone enjoying interest, the states declared that the beneficiary would be the IOLTA nonprofit foundation. How can there be a "taking" when the property was the IOLTA foundation's to begin with? How ironic it was for the Fifth Circuit to justify its dramatic incursion into state affairs by relying on a highly general rule of state law ("interest follows principal") while blindly ignoring the specific – and obvious – state intent to vest the legitimate claim of entitlement to IOLTA interest in the nonprofit IOLTA foundation.

At a time when governmental institutions across the land – both state and federal – are routinely criticized for economic waste and bureaucratic inefficiency, it is not only ironic but revealing that an organization with the leanings of the Washington Legal Foundation would mount such an attack on a creative state-based approach to reducing the banking costs associated with the maintenance of lawyer trust accounts, a cost savings that is directed toward improving the quality of justice available to state citizens in state courts. Indeed, the posture of this case indicates that respondents care more about scuttling IOLTA programs nationwide than they care about recovering any given client's "few dollars and some-odd cents." Of course, if respondents get their wish, those clients with deposits in IOLTA accounts will still earn zero on their "investment." At bottom, this lawsuit is less about who owns the IOLTA interest than how it is spent. And fundamental principles of federalism counsel against using the Constitution to frustrate how the state chooses to spend money that it has generated through its

own creativity. Whether IOLTA interest is spent to provide equal access to the courts for the poor or used to help state governmental entities defend suits sounding in constitutional tort should not matter. And, in the eyes of the Constitution, it does not matter. This Court, therefore, should deny respondents' attempt – and deter future litigants' attempts – to distort the Takings Clause in a way that facilitates substantial intrusions on legitimate state efforts to administer affairs that are fundamentally those of the state.

CONCLUSION

For all the reasons stated in this *amicus curiae* brief, the Conference of Chief Justices respectfully urges this Court to render a decision in favor of the Petitioners, and thereby give the states the freedom they desire to pursue equal justice under the law in state court for all state citizens.

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